IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO STRIKE PLAINTIFFS' NEW AND UNDISCLOSED EXPERT OPINIONS [DKT. #2241]

Plaintiffs continue to enter supplemental and untimely expert opinions[1] through declarations, affidavits, and supplemental reports ("declarations") on the eve of *Daubert* and dispositive motion hearings, and merely two months before trial. Defendants respectfully file this Reply to Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' New and Undisclosed Expert Opinions [Dkt. # 2241], and state as follows:

I. DISCUSSION

A. Declarations in support of *Daubert* Motions

Plaintiffs claim <u>all</u> of their proffered declarations are allowable for responding to *Daubert* challenges by reliance on a few cases where such declarations were allowed. [Dkt. #2314 at 11]. Defendants do not deny that certain declarations *may* be admissible in the context of *Daubert* under limited circumstances, but always within the discretion of the Court to determine whether or not the declarations are proper. The U.S. Supreme Court, the Tenth Circuit, and this Court have all emphasized that late-disclosed expert opinions (even those which are purportedly offered for purposes of *Daubert*) are disfavored because they deprive the opponent of a meaningful chance to respond and result in never-ending expert preparation.[2] Plaintiffs never

[1] *See also* Dkt. #2339 (Defendants' Motion to Strike Hannemann and Kanninen Supplemental Reports filed on July 14, 2009). Plaintiffs insist it is unfair that Defendants' expert reports were due after Plaintiffs' expert reports. [Dkt. #2314 at 1]. However, the Court's discovery plan settled this issue years ago, and subsequent orders confirm. [Dkt. Nos. 1075, 1376, 1658, 1706, 1787, 1839, 1842, and 1989]. Additionally, in *Akeva v. Mizuno*, 212 F.R.D. 306 (M.D. N.C. 2002), the Court held (addressing the very issue at hand) that, "When there is a discovery plan covering expert disclosures, the plan controls and not the explicit provisions of Rule 26(a)(2)(C)." *Id*. at 310. The fact that Plaintiffs do not like the scheduling orders is not proper grounds to simply disregard them.

[2] *See, e.g.*, Dkt #1787; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993) ("Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly"); *Miller v. Pfizer Inc.*, 356 F.3d 1326, 1334 (10th Cir. 2004) ("The orderly conduct of litigation demands that expert opinions reach closure."); *Palmer et al. v. Asarco, et al*., 2007 U.S. Dist. LEXIS 56969, 2007 WL 2254343 at *3 (N.D.Okla. Aug. 3, 2007).

sought the Court's leave to submit untimely declarations, but simply presumed to file them. Under the gate keeping function ascribed to the Court by *Daubert*, this Court should determine (1) if the information in the declaration was provided in the Rule 26 expert report, and (2) if the information contained in the declaration is harmless to the other side. *Allgood v. GM*, No. 1:02-cv-1077, 2006 U.S. Dist. LEXIS 70764, *15 (S.D. Ind. Sept. 18, 2006). The Plaintiffs' declarations fail both tests.

As to the first prong, this Court held any declaration "that states additional opinions or rationales or seeks to strengthen or deepen opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion." *Palmer v. Asarco Inc.*, No. 03-cv-059, 2007 U.S. Dist. LEXIS 56969, *15 (N.D. Okla. Aug. 3, 2007), *see also* Dkt. Nos. 1787, 1839, 1842, and 1989. Plaintiffs admit it is an "unassailable proposition that courts may strike untimely reports or improper attempts to "buttress" an initial report." [Dkt. #2314 at 12]. The Defendants' instant motion [Dkt. #2241] and discussion *infra* demonstrate the Plaintiffs use the declarations to supplement prior work with analysis and opinions not previously provided in the expert reports, therefore should be excluded. Plaintiffs' new experts do not merely offer testimony such as whether certain methodologies are generally accepted or have known error rates. Rather, many declarations offer new testimony as to what the principal testifying expert did, or what the declarant did to help the testifying expert, while other declarations outline additional analyses performed to justify the testifying experts' conclusions.

As to the second prong, the admission of late-disclosed expert opinions is hardly harmless to the Defendants even for the limited purpose of *Daubert*. The supplemental declarations are intended to prop up unreliable work and opinions by the Plaintiffs' actual, identified testifying experts. Thus, the use of these declarations could ultimately lead to the

admission of unreliable expert testimony during subsequent dispositive motion hearings and at trial, severely prejudicing the Defendants. As discussed *infra*, Plaintiffs' Response references only selected portions of the declarations in their Response to distract from the fact that they all contain material clearly beyond the permissible bounds of any permissible discretionary use.

Such tardy declarations are not appropriate for admission even in the limited context of a *Daubert* response. Allowing the supplementation of expert opinions and analyses with the work of undisclosed experts – even if just for *Daubert* purposes – could lead to the admission of otherwise unreliable expert testimony, which relies on inadmissible work for its credibility. Moreover, the credibility determination would have to be made on the strength of the say-so of non-testifying experts never subjected to the required Rule 26 disclosures and discovery. In *Dura Automotive Systems v. CTS Corporation*, the court found the proponent of the assisting expert's work is not permitted to introduce supporting evidence in the context of the *Daubert* challenge itself. 285 F.3d 609 (7th Cir. 2002). Specifically, the court stated, "A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science." *Id.* at 614. This is precisely the practice employed by the Plaintiffs with their so-called "consulting experts."

B. Declarations in support of Summary Judgment

The Plaintiffs reference a footnote to Federal Rule of Civil Procedure 56(e) which seems to allow the admission of the subject declarations. [Dkt. #2314 at 2]. However, the cases Plaintiffs cite in their Response specifically hold such evidence is *not admissible* for the purposes of summary judgment. *See e.g. Bryant v. Farmers Ins. Exchange*, 432 F. 3d 1114, 1122 (10th Cir. 2005) ("A summary judgment affidavit may not contain expert testimony unless the affiant has first been designated an expert witness under *Fed. R. Civ. P. 26(a)(2).*"); and *Reed v. Smith*

& Nephew, Inc., 527 F. Supp. 2d 1336, 1349-50 (W.D. Okla. 2007) ("Fed. R. Civ. P. 26(e)(1) imposes a continuing duty to supplement information contained in expert reports and in depositions if there are material additions or changes to what has been previously disclosed…Under Rule 37, a party that without substantial justification fails to disclose information required by Rule 26(a) or Rule 26(e)(1) is not . . . permitted to use as evidence at a trial . . . ***or on a motion*** any witness or information not so disclosed.") (Emphasis added).

C. Specific Declarations

i. Dr. Rick Chappell's declarations present untimely testimony from an undisclosed expert and should be stricken. [Dkt. Nos. 2072-6 and 2198-4].

Plaintiffs mischaracterize Chappell as an individual who "assisted" Dr. Olsen with his PCA analysis. [Dkt. #2314 at 7]. However, Olsen's testimony admits that Chappell ran ***every*** PCA analysis provided in Olsen's report. [Dkt. #2314-2, Ex. A, Olsen Dep. at 301:2-25]. Further the attached e-mail exchanges elucidate that Chappell lead the effort to attempt to formulate a dataset to distinguish cattle manure from poultry and WWTP. [Exhibit A]. Additional communications between Olsen and Chappell reveal Chappell authored sections of Olsen's report— specifically sections 6, 10, and 11. [Exhibit B]. Other electronic communications prove Chappell possessed an understanding of PCA analysis Olsen lacked, which was fundamental to Olsen's reported opinions. [Exhibit C].[3]

[3] To circumvent their failure to designate Chappell, Plaintiffs offer a red herring that Defendants "chose not to" depose Chappell. [Dkt. #2314 at 7]. Assuming *arguendo* Defendants could have deposed the hundreds of lab techs, assistants, and others who contributed to Plaintiffs' experts' work, such effort would belie the purpose of Rule 26 – to have designated, testifying experts. Rule 26 contemplates that parties designate person(s) responsible for the work supporting opinions in their report. Parties do not have to depose a roster of everyone used by a designated expert, or try to guess which one was the actual expert. This is why, under *Dura, supra,* if the expert is unable to testify to topics in their expert report, another undesignated scientist may not act as a "mouthpiece" for that expert. *Dura* at 614. Accordingly, if the Plaintiffs needed Chappell

In his declarations, Chappell proffers non-specific information about Olsen's work on this matter. Given that Olsen also filed a declaration [Dkt. #2103-10], it is unclear to Defendants why Olsen could not attest to the information Chappell offers. For example, in Chappell's declaration offered pursuant to the Plaintiffs' motion to exclude Cowan's testimony, he explains the construction and maintenance of Olsen's computer files. [Dkt. #2073-6, Para 9]. Chappell also offers opinions regarding the methods Olsen followed in analyzing his data. [Dkt. #2073-6, Paras. 14-21]. These topics should have been included in Olsen's report, and are not permissible as evidence from a separate undisclosed expert.

ii. Dr. Jim Loftis' declarations present untimely testimony from an undisclosed expert and should be stricken. [Dkt. Nos. 2064-5, 2083-4, 2074-4, 2072-5, and 2198].

Contrary to the depiction of Loftis in Plaintiffs' Response as someone who "double-check[ed]" the work of Plaintiffs' experts, Loftis actually performed new analyses. [Dkt. #2314 at 11]. For example, Loftis' late-disclosed statistical analysis contained in one of his declarations attempts to correct severe errors in Dr. Harwood's work. In his declaration, Loftis examines the use of relevant sample sizes, attempting to fix the problems created by Harwood's statistically irrelevant sample sizes. [Dkt. #2116-6]. Rather than issuing an errata regarding mistakes Harwood made, Plaintiffs attempt to correct her errors and add new analysis through an untimely and undisclosed bootstrapping expert. Loftis' work is supplemental in nature because it addresses deficiencies in the work of Harwood and Olsen, performs new analyses, and further evidences Plaintiffs are attempting to circumvent this Court's explicit Order precluding supplemental reports [Dkt. #1842] through untimely expert declarations.

---

to testify regarding the work he completed for Olsen's report, then Chappell's name should have been listed on the report (or on his own timely report) and expert disclosures made for him.

iii. Dr. Michael Sadowsky's "Declaration" presents untimely, supplemental testimony and should be stricken. [Dkt. Nos. 2116-1, 2116-2, and 2116-3].

Plaintiffs argue the work performed by Sadowsky is a "peer review" of Harwood's work and therefore should be admissible. [Dkt. #2314 at 13]. In reality, Sadowsky submitted to Plaintiffs an entirely new 64-page expert report attached to his declaration. Plaintiffs ask the Court to simply accept the assertions of this late-disclosed expert who has never been designated as a testifying expert, for whom disclosures were never made, who was never deposed, and whose motives and methods have never been scrutinized. Sadowsky's work also bolsters Harwood's because he completed blind testing (Harwood never attempted blind testing for this case; however she testified this is the appropriate way to test a microbial source tracking method). [Exhibit D, Harwood Jan. 2008 Depo. at 189:18-190:11].

The court in *Dura* held this exact use of declarations was not admissible, even in the context of a *Daubert* hearing. As in *Dura,* the Plaintiffs in this matter are not "hapless individuals. [Their] reticence about disclosing the other experts may have been strategic. At all events, in the circumstances the district judge could refuse to exercise lenity without being thought to have acted unreasonably." The Plaintiffs should have disclosed Sadowsky as a testifying expert and issued his 64-page report *prior* to the deadline for the submission of expert reports, if they intended for his work to be used.[4]

[4] Further, Plaintiffs attempt to paint any review by a 'scientific peer' as a *Daubert* peer-review by citing *United States* v. *Bonds,* 12 F.3d 540 (6th Cir. 1993) and a law student's Note in the New York Law Review. They fail to advise that Harwood's work actually has been reviewed by multiple peers for publication and her work has been roundly rejected by those peers because it is "inadequate," "inappropriate," and statistically unsupported. [Dkt. #2030 at 5]. Plaintiffs' attempt to rectify the fatal flaws in Harwood's work with an additional report from a new, previously undisclosed expert is simply not permissible.

iv. The declarations of Drs. Tamzen Macbeth and Jennifer Weidhaas present untimely new testimony and should be stricken. [Dkt. Nos. 2116-4 and 2116-5].

Plaintiffs' Response points to the Defendants' deposing of Macbeth as justification for her late opinions. This fails to account for Macbeth's deposition testimony that she was not conducting further testing in this case. [Exhibit E, Macbeth Dep. 44:9-16]. However, through declarations, Macbeth and Weidhaas both disclose volumes of late sampling and analysis, never subjected to discovery or deposition, and designed solely to bolster Harwood's report. Indeed, it appears from their declarations that, since submitting their expert reports, Plaintiffs tested hundreds of samples with their purported biomarker methodology.[5] While it is clearly late, the additional testing by MacBeth and Weidhaas is also intended to repair Harwood's insufficient sample sizes. It is not proper to supplement Harwood's report or offer the opinions of non-disclosed experts at this point to fix that problem, long-after the discovery and expert deadlines have passed. Therefore, the declarations offered by MacBeth and Weidhaas have not been reviewed, are unreliable, and should not be admitted.

Moreover, Plaintiffs' attempt to characterize Macbeth and Weidhaas as working at Harwood's direction is simply inaccurate. Macbeth contradicted this assertion throughout her deposition.[6] Because Macbeth and Weidhaas were intimately involved in the work for Harwood's report, they too, should have been listed as Rule 26 experts if the Plaintiffs wanted to

---

[5] *See, e.g.*, Dkt. #2116-5, Paras. 8-9 (Weidhaas testifying to testing in Oklahoma, Georgia, Florida, Minnesota, Utah, Arkansas, Colorado, Idaho, West Virginia, and Ohio); and Dkt. #2116-4, Paras. 5-6 (Macbeth testifying to the same).

[6] Macbeth testified to the following during her deposition: (1) Northwind was first contacted by CDM, not Harwood. [Ex. E, Macbeth Dep. at 29:20-30:16]; (2) The employees of Northwind were the experts in using PCR. These employees and some individuals at CDM designed the plan for Harwood's report. Harwood helped guide the plan only regarding microbiology specifics. [*Id*. at 35:1-36:16, 55:16-56:9]; and (3) Northwind's directions came from counselor David Page and Dr. Roger Olsen. [*Id*. at 183:1-186:23].

rely on their opinions and analyses. Their declarations are inadmissible because they clearly exceed the permissible bounds for a declaration offered for *Daubert* or motion for summary judgment hearings.

v. Mr. Darren Brown's "affidavit" presents untimely, supplemental, and rebuttal testimony and should be stricken. [Dkt. #2058-7].

Brown's affidavit contains information which should have been included in his expert report and is now untimely. Plaintiffs point to *Allgood* (citation *supra*), to justify Brown's unsworn affidavit. [Dkt. #2314 at 16]. However, in *Allgood*, the court stated the declarations "harmlessly repeat[ed] information provided in the earlier reports." *Allgood* at *15. Brown's affidavit is not a harmless repetition of his earlier report, but is an attempt to strengthen that report by addressing his failure to disclose the SOPs followed by the Plaintiffs' experts. Brown's attempt at this late date to now bolster his own report through disclosure of which SOPs were supposedly used, and to rebut Churchill's criticisms about Brown's shortcomings, all through a late-produced affidavit is just not permissible. "Courts may exclude specific opinions or bases for the expert's opinions that were not fairly disclosed in the expert's report." *Palmer v. Asarco*, No. 03-CV-059, 2007 U.S. Dist LEXIS 56969, *2 (N.D. Okla. Aug. 3, 2007). The new analyses[7] in Brown's affidavit never disclosed in his report plus his attempt to explain deficiencies in his report regarding the SOPs are mere bolstering, shed no light on the *Daubert* criteria, and are not admissible.

vi. Dr. Roger Olsen's declarations are untimely and should be stricken. [Dt. Nos. 2064-4, 2083-5, and 2103-10].

Olsen's declaration in support of Plaintiffs' Motion for Partial Summary Judgment also presents untimely, supplemental testimony. [Dkt. # 2103-10]. As discussed *supra*, declarations

[7] Brown also includes in his affidavit a "cross contamination mass evaluation" that is entirely new to his previously-submitted opinions. [Dkt. No. 2058-7, Ex. F, ¶26].

offered in support of or in response to motions for summary judgment do not share the same arena of broad discretion that *may* be afforded to *Daubert* responses. For example, in *Reed*, the Court held when a Rule 26 expert's affidavit (as with Olsen) contains "additions or other changes for which supplementation would have been required, then the affidavit should be stricken in its entirety." *Reed* at 1350. Olsen's declaration adds testimony regarding Figures 6.5-2, 6.5-4, 6.5-6, and 6.5-8. Such additions place Olsen's declaration directly within the realm of improper supplementation, therefore his declaration should not be allowed.

vii. Dr. Christopher Teaf's declarations present untimely new testimony and should be stricken. [Dkt. Nos. 2156-2, 2071-4, and 2130-3].

Plaintiffs' concession that a new declaration cannot "buttress" a witness's original work [Dkt. #2314 at 12] cannot be reconciled with Plaintiffs' argument that Teaf's declaration at Dkt. 2156-2 is permissible because it "elaborates" on the information contained in his original Expert Report. [Dkt. #2314 at 20-21]. In addition to impermissibly expanding prior opinions, Teaf's declaration contains self-serving new opinions that he believes he really is qualified to give expert testimony in this matter (*see, e.g.*, Dkt. #2156-2 at 4) and that his opinions have a reliable basis in science (*see, e.g.*, *Id.* at 5). Aside from these untimely and impermissible attempts at buttressing his own prior work, these new opinions by Teaf should be stricken because it is for the Court – not Teaf – to determine if he is qualified to offer his opinions and whether his opinions survive *Daubert's* relevancy and reliability tests.

Likewise, Teaf's declaration in support of the Plaintiffs' Motion to preclude the testimony of Sullivan (Dkt. #2071-4) should be stricken as a disallowed rebuttal report. Plaintiffs readily concede that its purpose is to rebut opinions contained in Sullivan's Expert Report. [Dkt. #2314 at at 20]. Despite Plaintiffs' strained attempts to convince this Court there is nothing new about Teaf's declarations, the bottom line is if Teaf did not need to manufacture new opinions to

support Plaintiffs' briefing efforts, Teaf would not have been asked to draft declarations in the first place and instead, Plaintiffs' briefs would have cited Teaf's original Expert Report, and perhaps deposition testimony. The fact that Plaintiffs requested Teaf to draft new, customized declarations to meet their briefing needs demonstrates that Teaf's declarations consist of new opinions that should be stricken by the Court.

viii. Dr. Berton Fisher's declaration presents untimely new testimony and should be stricken. [Dkt. Nos. 2198-5 and 2198-6].

Fisher admits he conducted further field investigation to bolster, and in some instances, contradict, field work done or that should have been included in Olsen's expert report. For example, in his declaration Fisher attempts to explain why the samples gathered from a location Plaintiffs' experts field notes confirmed to never have had any litter applied came back as positive for litter. [Dkt. #2198-5, paras. 11-12]. Such an inclusion in Fisher's declaration render it inadmissible under *Allgood*, "An expert report should be sufficiently complete as to include the substance of what the expert is expected to give in direct testimony, and the reasons for such testimony. The report should offer the how and why of the results, not mere conclusions." *Allgood* at *15. Fisher's declaration may not be used to fill holes in the Plaintiffs' expert reports.

II. CONCLUSION

For these reasons, Defendants respectfully request the Court strike Plaintiffs' declarations submitted in response to the summary judgment and *Daubert* briefs and for any and all other relief to which they may be entitled.

Respectfully submitted,

/s/ James M. Graves
James M. Graves, OBA #16657
Woody Bassett (*appearing pro hac vice*)
Gary V. Weeks (*appearing pro hac vice*)
Vincent O. Chadick, OBA #15981
K.C. Dupps Tucker (*appearing pro hac vice*)
BASSETT LAW FIRM LLP
221 North College Avenue
P.O. Box 3618
Fayetteville, AR 72702-3618
(479) 521-9996
(479) 521-9600 Facsimile
-And-

Randall E. Rose (OB #7753)
THE OWENS LAW FIRM, P.C.
234 West 13th Street
Tulsa, OK 74119
(918) 587-0021
(918) 587-6111 Facsimile

ATTORNEYS FOR GEORGE'S, INC. and GEORGE'S FARMS, INC., and for purposes of this Motion, for all defendants

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
Leslie Jane Southerland
Colin Hampton Tucker
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, OK 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390
-and-
Terry Wayen West
THE WEST LAW FIRM
-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Christopher H. Dolan
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600
-and-
Dara D. Mann
MCKENNA, LONG & ALDRIDGE, LLP

ATTORNEYS FOR CARGILL, INC. and CARGILL TURKEY PRODUCTION, LLC

Stephen L. Jantzen, OBA #16247
Patrick M. Ryan, OBA #7864
Paula M. Buchwald
RYAN, WHALEY, COLDIRON & SHANDY, P.C.
119 North Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

-and-

Thomas C. Green, Esq.
Mark D. Hopson, Esq.
Jay T. Jorgensen, Esq.
Gordon D. Todd
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8700
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
L. Bryan Burns
Timothy T. Jones
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC.; and COBB-VANTRESS, INC.

A. Scott McDaniel, OBA # 16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
Craig A. Mirkes, OBA #20783
McDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Avenue, Suite 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282
-and-
Sherry P. Bartley (*Appearing Pro Hac Vice)*
MITCHELL, WILLIAMS, SELIG, GAGES & WOODYARD, P.L.L.C.
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800

ATTORNEYS FOR PETERSON FARMS, INC.

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A
2000 AmSouth Plaza
P.O. Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136
-and-
Robert P. Redemann, OBA #7454
Lawrence W. Zeringue, OBA #9996
David C. Senger, OBA #18830
PERRIN, McGIVERN, REDEMANN, REID, BERRY & TAYLOR, P.L.L.C.
P.O. Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

COUNSEL FOR CAL-MAINE FOODS, INC. and CAL-MAINE FARMS, INC.

John R. Elrod, Esq.
Vicki Bronson, OBA #20574
P. Joshua Wisley
Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, LLP
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

ATTORNEYS FOR SIMMONS FOODS, INC.

CERTIFICATE OF SERVICE

I certify that on the 17th day of July, 2009, I electronically transmitted the attached document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov
Melvin David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Louis W. Bullock	lbullock@mkblaw.net
Robert M. Blakemore	bblakemore@bullockblakemore.com
Bullock, Bullock & Blakemore	
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	exidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice, LLC	

COUNSEL FOR PLAINTIFFS, STATE OF OKLAHOMA

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com

Thomas C. Green tcgreen@sidley.com
Gordon D. Todd gtodd@sidley.com
Sidley Austin LLP
Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
Michael Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
David Gregory Brown
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C .Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC
Sherry P. Bartley sbartley@mwsgw.com
Mitchell, Williams, Selig, Gates & Woodyard, PLLC
COUNSEL FOR PETERSON FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker jtuckercourts@rhodesokla.com
Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thillcourts@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West terry@thewestlawfirm.com
The West Law Firm

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Faegre & Benson LLP

Dara D. Mann dmann@mckennalong.com
McKenna, Long & Aldridge, LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves mgraves@hallestill.com
D. Kenyon Williams, Jr. kwilliams@hallestill.com
Hall, Estill, Hardwick, Gable, Golden & Nelson
COUNSEL FOR POULTRY GROWERS/ INTERESTED PARTIES/ POULTRY PARTNERS, INC.

Charles Moulton, Sr. Assistant Attorney General charles.moulton@arkansasag.gov
Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Office of the Attorney General
COUNSEL FOR STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR OKLAHOMA FARM BUREAU, INC.

Robin S. Conrad rconrad@uschamber.com
National Chamber Litigation Center

Gary S. Chilton gchilton@hcdattorneys.com
Holladay, Chilton and Degiusti, PLLC
COUNSEL FOR US CHAMBER OF COMMERCE AND AMERICAN TORT REFORM ASSOCIATION

Mark Richard Mullins richard.mullins@mcafeetaft.com
McAfee & Taft
COUNSEL FOR TEXAS FARM BUREAU; TEXAS CATTLE FEEDERS ASSOCIATION; TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

Mia Vahlberg mvahlberg@gablelaw.com
Gable Gotwals

James T. Banks jtbanks@hhlaw.com
Adam J. Siegel ajsiegel@hhlaw.com
Hogan & Hartson, LLP
COUNSEL FOR NATIONAL CHICKEN COUNCIL; POULTRY AND EGG ASSOCIATION & NATIONAL TURKEY FEDERATION

John D. Russell jrussell@fellerssnider.com
Fellers, Snider, Blankenship, Bailey & Tippens, PC

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
Friday, Eldredge & Clark, LLP
COUNSEL FOR ARKANSAS FARM BUREAU FEDERATION

Barry Greg Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
Titus, Hillis, Reynolds, Love, Dickman & McCalmon

Nikaa Baugh Jordan njordan@lightfootlaw.com
William S. Cox, III wcox@lightfootlaw.com
Lightfoot, Franklin & White, LLC
COUNSEL FOR AMERICAN FARM BUREAU AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

David Gregory Brown
Lathrop & Gage, LC
314 E. High Street
Jefferson City, MO 65101

Thomas C. Green
Sidley Austin Brown & Wood, LLP
1501 K. St. NW
Washington, DC 20005

Cary Silverman
Victor E. Schwartz
Shook, Hardy & Bacon LLP
600 14th St. NW. Ste. 800
Washington, DC 20005-2004

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center Street, Suite 200
Little Rock, AR 72201-2610

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Steven B. Randall
58185 County Road 658
Kansas, OK 74347

George R. Stubblefield
HC 66 Box 19-12
Proctor, OK 74457

/s/ James M. Graves
James Graves